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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 SOUTHERN DIVISION
14

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 VO DUONG TRAN,
19 Defendant.
20

Case No. SA CR 08-197-DOC
GOVERNMENT'S OPPOSITION TO
DEFENDANT'S UNEXHAUSTED MOTION
TO REDUCE SENTENCE PURSUANT TO
18 U.S.C. § 3582(C)(1)(A)

21 Plaintiff United States of America, by and through its counsel
22 of record, the United States Attorney for the Central District of
23 California and Assistant United States Attorney Robert J. Keenan,
24 hereby files this response to defendant's unexhausted motion to
25 reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A).

26 The government asks this Court to dismiss the motion without
27 prejudice, or grant a stay, due to defendant's failure to exhaust
28 administrative remedies. If the Court reaches the merits, the

1 government further argues that the motion must be denied because
2 defendant is not eligible for compassionate release under applicable
3 law.

4 This response is based upon the attached memorandum of points
5 and authorities, the files and records in this case, and such further
6 evidence and argument as the Court may permit.

7 DATED: April 9, 2020.

Respectfully submitted,

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TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE</u>
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS.....	2
A. Defendant's Crimes.....	2
B. Trial & Sentencing.....	3
C. Appeal & Post-Conviction Litigation.....	4
D. July 2018: Resentencing Hearing.....	4
E. Incarceration and Projected Release Date.....	6
F. Defendant's Failure to Exhaust Administrative Remedies....	6
G. The Bureau of Prisons' and Congress's Response to COVID-19.....	8
1. BOP's COVID-19-Specific Safety Precautions.....	8
2. Administrative Options Available to Inmates.....	12
III. LEGAL FRAMEWORK FOR COMPASSIONATE RELEASE.....	15
IV. ARGUMENT.....	18
A. Defendant Has Failed to Exhaust Administrative Remedies, And The Court Lacks Jurisdiction to Consider His Claims.....	18
1. Defendant Has Not Clearly Filed An Administrative Request For Compassionate Release And, Even If He Did So On The Date Alleged), He Has Not Waited The Requisite 30-Days To Allow BOP To Consider Any Such Request.....	19
2. Failure to Exhaust Cannot be Excused.....	20
B. Defendant Has Failed to Demonstrate an "Extraordinary and Compelling" Reason to Grant Permanent Compassionate Release.....	23
1. Defendant is Not eligible for Compassionate Release.....	24
2. Defendant Remains a Danger to the Community, Which Also Defeats his Eligibility for Release.....	28
C. Even If Defendant Were Otherwise Eligible, 18 U.S.C. § 3553(a) Factors Do Not Support a Shorter Sentence.....	29

TABLE OF CONTENTS (CONTINUED)

<u>DESCRIPTION</u>	<u>PAGE</u>
V. CONCLUSION.....	31

TABLE OF AUTHORITIES

<u>DESCRIPTION</u>	<u>PAGE(S)</u>
<u>CASES</u>	
<u>Bowles v. Russell,</u> 551 U.S. 205 (2007).....	20
<u>Dillon v. United States,</u> 560 U.S. 817 (2010).....	15, 16, 21, 24
<u>Fort Bend County v. Davis,</u> 139 S. Ct. 1843 (2019).....	21
<u>Landgraf v. USI Film Prods.,</u> 511 U.S. 244 (1994).....	20
<u>Meyers v. Bethlehem Shipping Corp.,</u> 303 U.S. 41 (1938).....	21
<u>Reeb v. Thomas,</u> 636 F.3d 1224 (9th Cir. 2011).....	12
<u>Ross v. Blake,</u> 136 S. Ct. 1850 (2016).....	21
<u>Shaw v. Bank of America Corp.,</u> 946 F.3d 533 (9th Cir. 2019).....	15, 18, 20
<u>United States v. Applewhite,</u> No. 08-CR-60037, 2020 WL 137452 (D. Or. Jan. 13, 2020).....	28
<u>United States v. Ayon-Nunez,</u> No. 16-CR-130-DAD, 2020 WL 704785 (E.D. Cal. Feb. 12, 2020).....	26
<u>United States v. Butler,</u> 970 F.2d 1017 (2d Cir. 1992).....	17
<u>United States v. Chambliss,</u> 948 F.3d 691 (5th Cir. 2020).....	17
<u>United States v. Davis,</u> No. 19-1604, ECF No. 50 (3d Cir. Mar. 20, 2020).....	27
<u>United States v. Ebbers,</u> --- F. Supp. 3d. ---, 2020 WL 91399 (S.D.N.Y. Jan. 8, 2020).....	17, 22, 23
<u>United States v. Eberhart,</u> No. 13-CR-313-PJH-1, 2020 WL 1450745 (N.D. Cal. Mar. 25, 2020).....	20, 21, 22, 24

TABLE OF AUTHORITIES (CONTINUED)

<u>DESCRIPTION</u>	<u>PAGE</u>
<u>United States v. Gileno</u> , No. 19-CR-161-VAB-1, 2020 WL 1307108 (D. Conn. Mar. 19, 2020).....	22, 26
<u>United States v. Gotti</u> , No. 02-CR-743, 2020 WL 497987 (S.D.N.Y. 2020).....	28
<u>United States v. Grass</u> , 561 F. Supp. 2d 535 (E.D. Pa. 2008).....	12
<u>United States v. Greenhut</u> , No. 18-CR-48-CAS, 2020 WL 509385 (C.D. Cal. Jan. 31, 2020).....	17
<u>United States v. Hamilton</u> , 715 F.3d 328 (11th Cir. 2013).....	17
<u>United States v. Hir</u> , 517 F.3d 1081 (9th Cir. 2008).....	29
<u>United States v. Mangarella</u> , No. 06-CR-151, 2020 WL 1291835 (W.D.N.C. Mar. 16, 2020).....	17
<u>United States v. Mayer</u> , 235 U.S. 55 (1914).....	21
<u>United States v. Nasirun</u> , No. 99-CR-367, 2020 WL 686030 (M.D. Fla. Feb. 11, 2020).....	24
<u>United States v. Neman</u> , No. 14-521-JAK, ECF No. 863 (C.D. Cal. Mar. 30, 2020).....	22, 23
<u>United States v. Raia</u> , No. 20-1033, 2020 WL 1647922 (3d Cir. Apr. 2, 2020).....	19, 22, 23
<u>United States v. Shah</u> , No. 10-70-CJC, ECF No. 329 (C.D. Cal. Mar. 30, 2020).....	21, 26
<u>United States v. Sloane</u> , No. 19-CR-10117-IT-11, ECF No. 647 (D. Mass. Mar. 19, 2020).....	22
<u>United States v. Urso</u> , No. 03-CR-1382, 2019 WL 5423431 (E.D.N.Y. Oct. 23, 2019).....	28

TABLE OF AUTHORITIES (CONTINUED)

<u>DESCRIPTION</u>	<u>PAGE</u>
<u>United States v. Wages</u> , 271 F. App'x 726 (10th Cir. 2008).....	17
<u>United States v. Weidenhamer</u> , No. CR16-01072-001-PHX-ROS, 2019 WL 6050264 (D. Az. Nov. 8, 2019).....	15
<u>United States v. Willingham</u> , No. CR113-010, 2019 WL 6733028 (S.D. Ga. Dec. 10, 2019).....	24
<u>United States v. Willis</u> , 382 F. Supp. 3d 1185 (D.N.M. 2019).....	17
<u>STATUTES</u>	
18 U.S.C. § 3142(g).....	21, 23
18 U.S.C. § 3582(c).....	passim
18 U.S.C. § 3621(b).....	6
18 U.S.C. § 3622.....	6, 8
18 U.S.C. § 3624.....	6
28 U.S.C. § 994(t).....	9, 10, 22
<u>OTHER AUTHORITIES</u>	
Attorney General, Memorandum for Director of Bureau of Prisons Re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (April 3, 2020), <u>available at</u> https://www.justice.gov/file/1266661/download	7
Attorney General, Memorandum for Director of Bureau of Prisons Re: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (March 26, 2020), <u>available at</u> https://www.justice.gov/file/1262731/download	8
California Executive Order N-33-20 (March 19, 2020), <u>available at</u> https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf	22
Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020).....	6

TABLE OF AUTHORITIES (CONTINUED)

<u>DESCRIPTION</u>	<u>PAGE</u>
Federal Bureau of Prisons Health Services Division, Pandemic Influenza Plan---Module 1: Surveillance and Infection Control (Oct. 2012), available at https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf	3
Federal Bureau of Prisons Health Services Division, Pandemic Influenza Plan---Module 3: Health Care Delivery (Oct. 2012), available at https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf	4
Federal Bureau of Prisons Program Statement No. 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g) (January 17, 2019), available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf	8, 18
Federal Bureau of Prisons Program Statement No. 5280.09, Inmate Furloughs (January 20, 2011), available at https://www.bop.gov/policy/progstat/5280_009.pdf	8
Federal Bureau of Prisons Program Statement No. 6190.04, Infectious Disease Management (Jun. 3, 2014), available at https://www.bop.gov/policy/progstat/6190_004.pdf	4
Federal Bureau of Prisons, Action Plan Phase V (Mar. 31, 2020), available at https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp	4, 5
Federal Bureau of Prisons, COVID-19 Action Plan: Agency-Wide Modified Operations (Mar. 13, 2020), available at https://www.bop.gov/resources/news/20200313_covid-19.jsp	4, 5
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TABLE OF AUTHORITIES (CONTINUED)

<u>DESCRIPTION</u>	<u>PAGE</u>
Federal Bureau of Prisons, Statement from BOP Director (Mar. 26, 2020), available at https://www.bop.gov/resources/news/20200326_statement_from_director.jsp	3, 5, 6
Federal Bureau of Prisons, Update on COVID-19 (Mar. 24, 2020), available at https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf	5
Federal Bureau of Prisons, Updates to BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), available at https://www.bop.gov/resources/news/20200319_covid19_update.jsp	3

REGULATIONS

USSG § 1B1.13.....	passim
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I. INTRODUCTION

Defendant VO DOUNG TRAN is an ex-Special Agent of the FBI, who, after being fired from that position, resorted to a life of crime. As the government established at trial in 2009, before Judge Guilford, defendant TRAN operated an interstate home-invasion robbery scheme. Over the course of six months, TRAN engaged in extensive, recorded conversations with a CI and an undercover agent during which he planned a home-invasion robbery of a purported drug-stash house in Fountain Valley, CA. In July 2008, TRAN flew out to Orange County with his co-defendant (YU SUNG PARK) to commit the robbery. Once here, they assembled an arsenal of five firearms (including a machinegun, silencer-equipped AR-15 rifle, and silencer-equipped handgun), hundreds of rounds of ammunition, zip-ties, and body armor.

In his pending motion, TRAN nonetheless requests an immediate and permanent compassionate release from imprisonment due to the COVID-19 epidemic. Moreover, he does so prematurely without having satisfied 18 U.S.C § 3582(c)(1)(A)'s mandatory administrative-exhaustion requirement or eligibility criteria and while ignoring the 18 U.S.C. § 3553(a) factors and his continuing danger to the community. Neither statutory authority nor public health demands such a windfall. Moreover, defendant's logic would endorse the mass, permanent release of convicted criminals into a pandemic, without regard for the factors justifying their sentences or for the Bureau of Prisons' (BOP's) individualized risk assessment. That is not a way to fight disease and not a way to protect the public.

The motion should be dismissed without prejudice, or stayed, until defendant has exhausted his administrative remedies within BOP. First, has failed to comply with the mandatory exhaustion requirement

1 of 18 U.S.C. § 3582(c), which thus requires dismissal of the motion
2 or, at minimum, a stay until the BOP has had an opportunity to assess
3 defendant's request or his eligibility for home confinement. Second,
4 even if the Court could reach the motion's merits, defendant is
5 neither eligible for, nor entitled to, compassionate release.

6 **II. STATEMENT OF FACTS**

7 **A. Defendant's Crimes**

8 In July 2008, after six months of planning, defendant TRAN and
9 his co-defendant, YU SUNG PARK ("PAR"), traveled to California from
10 their home states of Louisiana and Illinois to commit a violent,
11 home-invasion robbery of a residence that they believed was a stash-
12 house used by drug-traffickers to store large amounts of cash and
13 drugs. Upon their arrival in Orange County, defendants got a hotel
14 room and assembled an arsenal in preparation for the robbery,
15 including (1) a fully-automatic machinegun; (2) an AR-15 assault
16 rifle equipped with a silencer; (3) three handguns, one of which was
17 equipped with a silencer and netting to catch discharged shell
18 casings; (4) 30 magazines fully-loaded with 600 rounds of ammunition;
19 (5) four bullet proof vests; (6) raid gear; and (7) several large
20 "zip-ties" that they intended to use to restrain the occupants of the
21 stash-house. (See Ex. "A" for photos of defendant's cache of
22 firearms.)

23 While armed with a handgun, defendants then met up with two
24 supposed co-conspirators to plan the robbery.¹ After casing the
25 stash-house, defendants met with the others in a hotel room to plan
26

27 ¹ The two supposed co-conspirators were, in fact, an undercover
28 FBI Agent ("UC Agent") and a Confidential Informant ("CI").

1 exactly how they would commit the robbery, which they agreed would be
2 committed on the following day. They were deadly serious.
3 Defendants instructed the CI and UC Agent about the following
4 matters: (1) the number of guys who would make entry into the house;
5 (2) tactics for making a forcible entry into the house and subduing
6 the occupants, with PARK noting "I'd rather zip-tie him up and use
7 him as a shield"; (3) the need to "shoot" anyone who runs, with PARK
8 stressing that you "can't miss" and "take two or three shots at one
9 guy"; (4) whether neighbors would hear if they "light off a fuckin'
10 M16 round"; and (5) who would stay outside to serve as a lookout,
11 getaway driver, and handle the "big gun" (i.e., the machinegun) in
12 the event "black-and-whites" showed up. PARK quipped that the raid
13 would be "like shooting fish in a barrel."

14 **B. Trial & Sentencing**

15 In March 2009, a jury convicted defendants TRAN and PARK of the
16 following offenses: (1) conspiracy to commit a robbery affecting
17 interstate commerce, in violation of 18 U.S.C. § 1951(a) ("the Hobbs
18 Act"), (2) interstate travel and acquisition of a firearm with intent
19 to commit a robbery, in violation of 18 U.S.C. § 924(g);
20 (3) possession of firearms in furtherance of a "crime of violence,"
21 namely, the Hobbs Act robbery conspiracy charged in Count One and the
22 § 924(g) offense charged in Count Two; and (4) possession of a
23 machinegun, in violation of 18 U.S.C. § 922(o)(1). (CR 161.) The
24 verdicts on the 924(c) count triggered a mandatory-minimum sentence
25 of 30 years because the offense involved a machinegun and silencers.

26 On April 26, 2010, after denying post-trial motions for
27 acquittal and new trial, this Court (per Judge Guilford) sentenced
28

1 both defendants TRAN and PARK to a term of 30 years' imprisonment,
2 the minimum sentence then allowed by law. (CR 253, 255.)

3 **C. Appeal & Post-Conviction Litigation**

4 On May 24, 2012, the Ninth Circuit affirmed defendants'
5 convictions on all counts. (See CR 291; see also 9th Cir. Case Nos.
6 10-50207 & 10-50268.) Defendants TRAN and PARK thereafter filed
7 § 2255 motions to vacate their convictions and sentences on various
8 grounds.

9 On March 30, 2018, the Court (per Judge Guilford) denied
10 defendants' § 2255 motions as to most of their claims, but granted it
11 in part as to Count 3, the § 924(c) count. Specifically, the Court
12 vacated their convictions and sentences on Count 3 on the ground that
13 § 924(c) is unconstitutionally vague under Johnson v. United States,
14 135 S. Ct. 2551 (2015), and the Ninth Circuit's decision in Dimaya v.
15 Lynch, 803 F.3d 1110 (9th Cir. 2015), affirmed Sessions v. Dimaya,
16 138 S. Ct. 1204 (2018).

17 **D. July 2018: Resentencing Hearing**

18 The order vacating the § 924(c) conviction and its 30-year
19 mandatory-minimum sentence required both defendants to be
20 resentenced. On July 11, 2018, the Court held a hearing for the
21 resentencing of defendants on the three remaining counts of
22 conviction for the Hobbs Act robbery conspiracy (Count 1) and the
23 related firearms offenses (Counts 2 and 4). (See CR 378, 380; see
24 also CR 394, RT 7/11/2018.)

25 TRAN argued for a time-served sentence of approximately 10
26 years, noting that he had by then already served a lengthy sentence,
27 had a satisfactory record of good behavior while in prison, had no
28 prior criminal history, and had a supportive family. (See CR 370;

1 see also RT 7/11/2018: 15-20.) The government argued for a 30-year
2 sentence, as Dimaya had not yet been decided by the Supreme Court and
3 the government maintained that § 924(c)'s 30-year mandatory-minimum
4 still controlled. Under § 3553(a), the government strongly opposed
5 defendants' requests for a time-served sentence because both
6 defendants posed a danger to the community.

7 Notwithstanding defendant's claim that he was a changed man and
8 a time-served sentence of 10 years was sufficient, the Court
9 sentenced defendant to a sentence of 15 years' imprisonment, above
10 the Guidelines range. (CR 378, 379; see also CR 394; RT 7/11/18: 37-
11 40.) In explaining its sentence, the Court acknowledged that
12 defendant had "done a good job in prison" and had "lot[s] of support
13 from others," which "speaks well of [defendant TRAN]." (CR 394; RT
14 7/11/18: 37.) However, the Court said it felt a sentence of 15
15 years' imprisonment was necessary to achieve the goals of sentencing
16 under § 3553(a). (RT 7/11/18: 37-40.) Judge Guilford said that one
17 of the "things that continue[d] to trouble [him] about the
18 defendants" was "the callousness of the crimes that you were
19 convicted of," which goes to the "nature and circumstances of the
20 offense." (Id. at 37.) Judge Guilford noted that he was "still ...
21 affected" by the conduct which was "summarized by the government" as
22 follows:

23 "The insouciant nihilism exhibited by the
24 defendants make them very dangerous to society.
25 By their words and deeds, defendants have made
26 clear they care only for themselves and recognize
27 no moral limitations on their behavior. In some
28 of the more chilling undercover statements, Tran
repeatedly told the CI that he and his 'dialed-in
guy' ... always had a 'big' 'powerful rifle'
outside the target at home so they could go to
war if any police officer showed up at an
inopportune time. In a clear reference to the

1 machine gun, Tran bragged that he could take out
2 five cops in a second if he had to do so."

3 (Id. at 37-38.)

4 As Judge Guilford continued:

5 That is a serious offense, and my sentence needs
6 to take into account the seriousness of the
7 offense. I certainly need to promote respect for
8 the law and provide a just punishment. I need to
9 convince others not to engage in this conduct.
Aspects of the law show concern about what people
say. "Five cops in a second" is a serious
statement here. Perhaps most importantly to me
is I need to protect the public from further
crimes of the defendant....

10 (Id. at 38.)

11 Defendant PARK also received a 15-year sentence (CR 380, 381)
12 because Judge Guilford thought the defendants were similarly situated
13 and deserved identical sentences. (See CR 394; RT 7/11/18: 40.)

14 **E. Incarceration and Projected Release Date**

15 Defendant is currently serving his sentence at the Federal
16 Correctional Institution I in Oakdale, Louisiana ("FCI Oakdale").
17 Counting from the day of his arrest in July 2008, defendant has
18 served approximately 11 years & 9 months of his 15-year sentence.
19 According to the BOP's website, defendant's projected release date is
20 approximately one year from now: June 4, 2021.

21 **F. Defendant's Failure to Exhaust Administrative Remedies**

22 In his motion, defendant claims that he has attempted to exhaust
23 administrative remedies. (See Mtn. at 10-11; see also Exs. At pgs.
24 1-3) (Defendant's E-Mail Declarations).) Defendant claims that "he
25 was able to submit the request" for compassionate release on Monday,
26 March 30, 2020. (Mtn. at 11.) He further alleges that, on the next
27 day, March 31, 2020, the staff posted a memorandum stating that the
28 institution was "waiting for guidance" before they would process any

1 immediate release request pursuant to the Barr Memo. (Id.) Finally,
2 defendant's motion claims that, on Thursday, April 2, 2020, defendant
3 "spoke directly to Warden R. Myers, who refused to accept the Request
4 (a copy of the one initially submitted)," and "the request was
5 [thereafter] returned to him by staff, with no action having been
6 taken," on Friday, April 3, 2020. (Id.)

7 In his e-mail/declaration, however, defendant TRAN states it
8 somewhat differently, and essentially admits that he's relying on an
9 assumption. In his second e-mail/declaration dated April 4, 2020,
10 defendant says that, "[o]n the returned Cop-Out, there was no
11 Disposition, nothing was noted. This is a Denial by the Warden plain
12 and simple." (Def. Exs. at 3.)

13 Within the short time available to respond to defendant's
14 "emergency" motion, government counsel has investigated these
15 allegations with the assistance of BOP Counsel. BOP and FCI-Oakdale
16 staff has been inundated with similar requests. Nonetheless, at
17 present, government counsel has been advised as follows:

18 1. The Case Manager for defendant TRAN at FCI Oakdale has said
19 that he has no knowledge of any RIS request (i.e., a Request for a
20 Reduction in Sentence ("RIS")) submitted by defendant TRAN. (A Case
21 Manager is on an inmate's Unit Team, and they ordinarily are the
22 staff that provide and receive administrative remedy forms from the
23 inmate population.)

24 2. Moreover, the Case Manager has advised that TRAN has not
25 submitted any "cop-outs" to him regarding an RIS request. (An RIS
26 request is the same thing as compassionate release request, and a
27 "cop-out" is an "Inmate Request to Staff" form that can be
28 handwritten or electronically sent to staff.)

1 3. There was no memo sent out stating the BOP staff cannot
2 process RIS requests or grievances.

3 4. Defendant TRAN has submitted a BP-9 (Administrative Remedy)
4 form to the Warden's Office. The date of its submission is unclear.
5 The BP-9 (Administrative Remedy) form is reportedly being processed
6 now, but the BOP's SENTRY Administrative Remedy Generalized Retrieval
7 Report regarding defendant TRAN does not yet reflect it being filed.
8 Government counsel and BOP Legal have requested, but not yet
9 received, a copy of that BP-9 form from FCI-Oakdale staff. Thus, the
10 substance of the form and any remedy requested therein is not yet
11 known by counsel.

12 5. The RIS Coordinator at FCI Oakdale last stated that
13 defendant TRAN has not submitted an RIS request. So, the BP-9 form
14 referenced above was not considered an RIS/compassionate-release
15 request. Thus, as of this date, based on currently available
16 information, government counsel is informed that defendant TRAN has
17 not yet submitted a request to the Warden's Office.

18 Because these facts are, of course, important to the issue of
19 defendant's exhaustion of administrative-remedies, government counsel
20 will continue to pursue relevant information and update this
21 submission as soon as additional facts are confirmed. This
22 opposition is submitted at this time in light of the "emergency"
23 nature of the motion and today's deadline.

24 **G. The Bureau of Prisons' and Congress's Response to COVID-19**

25 **1. BOP's COVID-19-Specific Safety Precautions**

26 BOP has taken aggressive steps to protect inmates' health and to
27 resist the spread of COVID-19. "[M]aintaining safety and security of
28 BOP institutions is [the BOP's] highest priority." BOP, Updates to

1 BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), available
2 at https://www.bop.gov/resources/news/20200319_covid19_update.jsp.
3 Thus, the BOP Director recently emphasized that the "response [to
4 COVID-19] is the Bureau's top priority." BOP, Statement from BOP
5 Director (Mar. 26, 2020) (Statement from BOP Director), available at
6 [https://www.bop.gov/resources/news/20200326_statement_from_director.j](https://www.bop.gov/resources/news/20200326_statement_from_director.jsp)
7 [sp](https://www.bop.gov/resources/news/20200326_statement_from_director.jsp).

8 The BOP has never underestimated the threat of infectious
9 disease. To the contrary, the BOP has had a Pandemic Influenza Plan
10 in place since 2012. Id.; BOP, Pandemic Influenza Plan---Module 1:
11 Surveillance and Infection Control (Oct. 2012), available at
12 https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That
13 protocol is astoundingly detailed, establishing a six-phase framework
14 requiring BOP facilities to begin preparations when there is first a
15 "suspected human outbreak overseas." Id. at i (emphasis added).

16 At extremely early stages, the Pandemic Influenza Protocol
17 requires BOP facilities to ensure inmates' access to soap, to train
18 them on hand-hygiene practices, and to ensure adequate infection-
19 control supplies. Id. at 9. For every phase thereafter (from
20 preliminary preparation, to a response to active pandemic, to
21 recovery), it includes detailed procedures required of every BOP
22 facility. Id. at 9-11. These include policies for ensuring for
23 creating "social distance" and for requiring "frequent environmental
24 cleaning of 'high-touch' surfaces." Id. at 2-3, 6. Facilities must
25 follow protocols on how to identify sick inmates, track their
26 interactions, and quarantine the exposed. Id. at 4-5. They must
27 also establish contingency plans to ensure that medical care is not
28 disrupted, even when faced with an influx of sick inmates. BOP,

1 Pandemic Influenza Plan--Module 3: Health Care Delivery (October
2 2012), available at
3 https://www.bop.gov/resources/pdfs/pan_flu_module_3.pdf. (The BOP
4 has similar protocols for a wide range of diseases. See BOP Program
5 Statement No. 6190.04, Infectious Disease Management (June 3, 2014),
6 available at https://www.bop.gov/policy/progstat/6190_004.pdf.)

7 The BOP implemented its Pandemic Influenza Protocol in January
8 2020, modified as a COVID-19 Action Plan. BOP, Action Plan Phase V
9 (Mar. 31, 2020) ("Action Plan Phase V"), available at
10 https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp
11 In Phase 1 of that plan, the BOP began developing policies in
12 consultation with the Centers for Disease Control. See BOP, COVID-19
13 Action Plan: Agency-Wide Modified Operations (March 13, 2020) ("BOP
14 Action Plan"), available at
15 https://www.bop.gov/resources/news/20200313_covid-19.jsp.

16 Since then, the BOP has serially escalated its response. BOP,
17 Bureau of Prisons Update on COVID-19 (Mar. 24, 2020), available at
18 [https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_co](https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf)
19 [vid19_update.pdf](https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf). On March 13, the BOP moved to Phase 2 of its
20 Action Plan, taking steps to "mitigate the spread of COVID-19" in
21 prisons, for the protection of both inmates and staff. See BOP
22 Action Plan, supra. The BOP suspended social and legal visits,
23 curtailed inmate movement, established enhanced screening procedures
24 for inmates and staff, and curtailed staff travel. Id. Consistent
25 with the Pandemic Flu Protocol, facilities adopted "modified
26 operations"---including staggered meal and recreation times---to
27 promote social distancing. Id. Just five days later, the BOP
28 escalated to Phase 3--taking additional steps, including ensuring

1 that "all cleaning, sanitation, and medical supplies" had been
2 inventoried and were adequately stocked. Id.

3 Phases 4 and 5 followed in late March. Beginning March 26, the
4 BOP required all newly admitted inmates to be quarantined or isolated
5 for a minimum of 14 days "or until cleared by medical staff." See
6 Action Plan Phase V, supra. And, as of April 1, the BOP has
7 instituted a nationwide lockdown. Id. For at least a two-week
8 period, "inmates in every institution will be secured in their
9 assigned cells/quarters to decrease the spread of the virus." Id.
10 The BOP has also "significantly decreas[ed] incoming movement. Id.

11 The gravity and severity of these measures reflect BOP's
12 commitment to fighting COVID-19 and protecting inmates. And,
13 although the BOP has not been immune from the pandemic, it has "thus
14 far been fortunate in that [its] rate of COVID-19 infection is
15 remarkably low." Statement from BOP Director, supra.

16 As of April 9, 2020--despite tens of thousands of COVID-19 cases
17 across the country and over 146,000 inmates in BOP custody--284
18 federal inmates and 125 BOP staff have confirmed-positive test
19 results for COVID-19 nationwide. All are being isolated from other
20 inmates and receiving medical treatment. BOP, COVID-19 Coronavirus
21 (updated daily at 12pm Pacific), available at
22 <https://www.bop.gov/coronavirus/index.jsp> At present, within the BOP
23 system, there have been 8 federal inmate deaths and 0 BOP staff
24 member deaths attributed to COVID-19 disease.

25 According to the latest information available on the BOP's
26 website (as of April 9, 2020), in defendant's facility (FCI Oakdale),
27 there have been 36 inmates and 14 BOP staff diagnosed with COVID-19.
28 (Id.) Of those, 5 inmates have died. (Id.) However, in some

1 indication of a leveling-off of the situation, the last such death at
 2 FCI Oakdale reportedly occurred six days ago, on or about April 3,
 3 2020.

4 Of course, "as warned by the Surgeon General of the United
 5 States, [the BOP] expect[s] to have more cases as the virus continues
 6 to spread in the general community," but they "will continue to
 7 diligently support all persons system-wide while doing everything
 8 [they] can to do [their] part in mitigating the spread of the virus."
 9 Statement from BOP Director, supra.

10 **2. Administrative Options Available to Inmates**

11 Inmates with COVID-19-based concerns also have a variety of
 12 administrative options they can pursue through the BOP itself.
 13 Although not reviewable by courts, these options include far more
 14 flexible remedies than permanent reduction of a sentence under 18
 15 U.S.C. § 3582(c)(1)(A)--remedies better suited to a temporary (if
 16 dire) pandemic. See generally 18 U.S.C. § 3621(b) (precluding
 17 judicial review of BOP placement decisions); Reeb v. Thomas, 636 F.3d
 18 1224, 1226-28 (9th Cir. 2011) (courts lack jurisdiction to review
 19 BOP's placement decisions under 18 U.S.C. §§ 3622-24); United States
 20 v. Grass, 561 F. Supp. 2d 535, 537 (E.D. Pa. 2008) (same).

21 First, the BOP can transfer vulnerable inmates to home
 22 confinement. See generally 18 U.S.C. § 3624(c)(2). The CARES Act,
 23 which Congress passed to address the COVID-19 crisis, vastly
 24 increased BOP's statutory authority to do so. See Coronavirus Aid,
 25 Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136,
 26 § 12003(b)(2), 134 Stat. 281, 516 (March 27, 2020) (allowing BOP to
 27 "lengthen the maximum amount of time the Director is authorized to
 28 place a prisoner in home confinement" under 18 U.S.C. § 3624(c)(2)).

1 Under this expanded authority--which came into effect only on April
2 3, 2020--inmates "do not need to apply to be considered for home
3 confinement." Federal Bureau of Prisons, Home Confinement (Apr. 5,
4 2020) ("BOP, Home Confinement"), available at
5 [https://www.bop.gov/resources/news/20200405_covid19_home_confinement.](https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp)
6 [jsp](https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp).

7 In his April 3, 2020, memorandum authorizing the BOP to exercise
8 its expanded CARES Act authority, the Attorney General emphasized
9 that "time is of the essence," and he directed the BOP to focus on
10 facilities that have significant numbers of COVID-19 cases within
11 their inmate population. Attorney General, Memorandum for Director
12 of Bureau of Prisons Re: Increasing Use of Home Confinement at
13 Institutions Most Affected by COVID-19 (April 3, 2020), available at
14 <https://www.justice.gov/file/1266661/download>. Thus, as of April 3,
15 the BOP is "urgently reviewing all inmates" to determine their
16 eligibility, increasing resources to "review and make appropriate
17 decisions as soon as possible." BOP Home Confinement, supra
18 (emphasis added).

19 Even before its expanded CARES Act authority came into effect,
20 the BOP had placed "an additional 566 inmates on home confinement" to
21 address the COVID-19 crisis, bringing the national total to nearly
22 3,500. Id. This was consistent with the Attorney General's March
23 26, 2020, memorandum encouraging the BOP to exercise pre-CARES-Act
24 authority as broadly as possible to protect "the people in [their]
25 custody," taking into consideration prisoners' age, vulnerability to
26 COVID-19, and other factors. See Attorney General, Memorandum for
27 Director of Bureau of Prisons Re: Prioritization of Home Confinement
28

1 as Appropriate in Response to COVID-19 Pandemic (March 26, 2020),
2 available at <https://www.justice.gov/file/1262731/download>.

3 Second, the BOP has authority to grant an inmate a temporary
4 furlough from custody, under 18 U.S.C. § 3622, for "obtaining medical
5 treatment not otherwise available," "visiting a relative who is
6 dying," or "any other significant activity consistent with the public
7 interest." See BOP Program Statement No. 5280.09, Inmate Furloughs
8 (January 20, 2011), available at
9 https://www.bop.gov/policy/progstat/5280_009.pdf. Certain COVID-19-
10 related conditions would potentially satisfy the BOP's requirements
11 for such a furlough. Id.

12 Finally, under 18 U.S.C. § 3582(c)(1)(A)--which, unlike BOP's
13 placement decisions, allows for judicial review--the BOP has initial
14 authority to assess inmates' applications for compassionate release.
15 The BOP, which has decades of experience diligently assessing such
16 applications, has detailed regulations setting forth relevant
17 procedures and considerations. See BOP Program Statement No.
18 5050.50, Compassionate Release/Reduction in Sentence: Procedures for
19 Implementation of 18 U.S.C. §§ 3582 and 4205(g) (January 17, 2019),
20 available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

21 However, as noted above, BOP has no record of defendant filing
22 any such administrative request for compassionate release with the
23 BOP. Even if, as he claims, defendant attempted to file such a
24 request administratively, defendant alleges that he first attempted
25 to do so on March 27, 2020. (See Defendant's E-Mail Declarations, at
26 pages 17-19 of the Motion.) Thus, defendant's motion is premature
27 because it was filed before allowing the BOP the statutorily-mandated
28 30 days to evaluate and act on that request. As a result, there is

1 no administrative record yet to review of the BOP's assessment of the
2 statutory compassionate-release factors.

3 **III. LEGAL FRAMEWORK FOR COMPASSIONATE RELEASE**

4 A compassionate-release motion is a request for a permanent
5 reduction in a defendant's federal sentence. A district court
6 generally "may not modify a term of imprisonment once it has been
7 imposed." See 18 U.S.C. § 3582(c); see Dillon v. United States, 560
8 U.S. 817, 824-25 (2010). Compassionate release is one of the few
9 exceptions to this rule, allowing a court to "reduce the term of
10 imprisonment (and . . . impose a term of probation or supervised
11 release with or without conditions that does not exceed the unserved
12 portion of the original term of imprisonment)[.]" 18 U.S.C.
13 § 3582(c)(1).

14 Because this relief is both drastic and permanent, it is subject
15 to strict statutory conditions. First, a district court can evaluate
16 a defendant's request for compassionate release only "after the
17 defendant has fully exhausted all administrative rights" before the
18 BOP. Specifically:

19 after the defendant has fully exhausted all
20 administrative rights to appeal a failure of the
21 Bureau of Prisons to bring a motion on the
22 defendant's behalf or the lapse of 30 days from
the receipt of such a request by the warden of
the defendant's facility, whichever is earlier[.]

23 18 U.S.C. § 3582(c)(1)(A). This requirement is mandatory and
24 jurisdictional. See generally Shaw v. Bank of America Corp., 946
25 F.3d 533, 541 (9th Cir. 2019) ("statutorily-provided exhaustion
26 requirements deprive the court of jurisdiction"); United States v.
27 Weidenhamer, No. CR016-01072-001-PHX-ROS, 2019 WL 6050264, at *2
28 (D. Az. Nov. 8, 2019) (citing cases).

1 Second, in evaluating compassionate-release motions, courts must
2 follow both the statute and binding policy statements. See id.; 28
3 U.S.C. § 994(t); USSG § 1B1.13. Pursuant to those authorities, to be
4 eligible for compassionate release, a defendant must demonstrate:
5 (1) the existence of extraordinary and compelling reasons, within the
6 meaning of the statute; and (2) that he is not a danger to the
7 community. 18 U.S.C. § 3582(c)(1)(A). Specifically, the statute
8 requires that any reduction be "consistent with applicable policy
9 statements issued by the Sentencing Commission"--in this case, USSG
10 § 1B1.13. Id. As the Supreme Court recognized in Dillon, 560 U.S.
11 at 827, because § 3582(c) permits a sentencing reduction only where
12 it is "consistent with applicable policy statements issued by the
13 Sentencing Commission," such policy statements are binding on a court
14 determining eligibility.

15 USSG § 1B1.13 explicitly defines the "extraordinary and
16 compelling reasons" that make a defendant eligible for compassionate
17 release. See 28 U.S.C. § 994(t). They include, as relevant here,
18 (1) a "terminal illness"; (2) a serious medical condition that "that
19 substantially diminishes the ability of the defendant to provide
20 self-care within the environment of a correctional facility and from
21 which he or she is not expected to recover"; or (3) a defendant who
22 is at least 65 years old, is experiencing a serious deterioration in
23 physical or mental health because of the aging process, and "has
24 served at least 10 years or 75 percent of his or her term of
25 imprisonment, whichever is less." USSG § 1B1.13 (other grounds
26 omitted). USSG § 1B1.13, comment. (n.1(A)-(B)). "[R]ehabilitation
27 of the defendant is not, by itself, an extraordinary and compelling
28 reason for purposes of this policy statement." Id., comment. (n.3).

1 Defendant bears the burden to prove both (1) he has "exhausted
2 all administrative rights" and (2) that "extraordinary and compelling
3 reasons" exist to support his motion. See 18 U.S.C. § 3582(c)(1)(A);
4 see United States v. Greenhut, No. 18-CR-48-CAS,
5 2020 WL 509385, at *1 (C.D. Cal. Jan. 31, 2020) (defendant bears the
6 burden of establishing entitlement to sentencing reduction); United
7 States v. Hamilton, 715 F.3d 328, 337 (11th Cir. 2013) ("defendant,
8 as the § 3582(c)(2) movant, bears the burden of establishing"
9 eligibility); see generally United States v. Butler, 970 F.2d 1017,
10 1026 (2d Cir. 1992) ("A party with an affirmative goal and
11 presumptive access to proof on a given issue normally has the burden
12 of proof as to that issue.").

13 Third, even for defendants who are statutorily eligible,
14 compassionate release is a "rare" and "extraordinary" remedy, within
15 district courts' discretion to deny. United States v. Chambliss, 948
16 F.3d 691, 693-94 (5th Cir. 2020); United States v. Mangarella, No.
17 06-CR-151, 2020 WL 1291835, at *2-3 (W.D.N.C. Mar. 16, 2020).
18 Specifically, "it is a rare case in which health conditions present
19 an 'exceptional reason'" to allow for release where detention would
20 otherwise be warranted. See, e.g., United States v. Wages, 271 F.
21 App'x 726, 728 (10th Cir. 2008) (collecting pre-trial detention
22 cases); accord United States v. Willis, 382 F. Supp. 3d 1185, 1188
23 (D.N.M. 2019) ("most courts treat compassionate release 'due to
24 medical conditions [a]s ... a rare event."). This reluctance to
25 expansively apply compassionate release is grounded in a concern that
26 any less narrow application would yield significant sentencing
27 disparities. United States v. Ebberts, -- F. Supp. 3d. --, 2020 WL
28 91399, at *6 (S.D.N.Y. Jan. 8, 2020).

IV. ARGUMENT

Defendant's motion must be dismissed, because he has failed to exhaust administrative remedies. At minimum, the Court should stay consideration of the motion until after the BOP has had the statutorily-prescribed period to adjudicate defendant's unconfirmed administrative request--a period during which the BOP can also consider defendant's eligibility for a transfer to home confinement. Even if this Court could reach the motion's merits, defendant's claims must be rejected because (1) he is not eligible for compassionate release; and (2) even if he were, the COVID-19 crisis does not justify a permanent, irrevocable reduction in his sentence, especially in light of the unfair disparity that would create vis-a-vis his co-defendant.

A. Defendant Has Failed to Exhaust Administrative Remedies, And The Court Lacks Jurisdiction to Consider His Claims

This Court lacks authority to act on defendant's compassionate-release motion at this time. Under 18 U.S.C. § 3582(c)(1)(A), the Court "may not modify a term of imprisonment once it has been imposed except" upon a defendant's motion "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]"

Because this statutory condition has not been satisfied here, the Court lacks authority to adjudicate defendant's claims. See Shaw, 946 F.3d at 541. Moreover, contrary to defendant's assertion, failure to exhaust cannot be excused. Instead, as the Third Circuit recently held, § 3882(c)(1)(A) "presents a glaring roadblock

1 foreclosing compassionate release at this point. United States v.
2 Raia, No. 20-1033, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020).

3 **1. Defendant Has Not Clearly Filed An Administrative Request**
4 **For Compassionate Release And, Even If He Did So On The**
5 **Date Alleged), He Has Not Waited The Requisite 30-Days To**
6 **Allow BOP To Consider Any Such Request**

7 Defendant claims that "he was able to submit the request" for
8 compassionate release on Monday, March 30, 2020, and that it was
9 returned with no action, which he assumes constitutes a rejection of
10 his request by the Warden at FCI Oakdale. (See Mtn. at 11; Deft's
11 Apr. 4, 2020 E-Mail Declaration, at page 3 of Defense Exhibits.)

12 However, defendant's motion does not provide the Court or
13 government counsel with copies of any such request. We are asked to
14 rely simply upon an allegation made by defendant in e-mail, though
15 under penalty of perjury. Moreover, although the government's
16 investigation is not yet complete due to the "emergency" rushed
17 nature of this process, the information available to counsel at this
18 time indicates that BOP has no record of defendant TRAN making a
19 request for compassionate release. Thus, on this record, it is not
20 clear that defendant has, in fact, effectively filed any
21 administrative request for compassionate release with the warden at
22 all. Before the Court may decide this motion, defendant must file
23 that request. Only after 30 days from the BOP's receipt of that
24 request can this Court consider defendant's motion. 18 U.S.C.
25 § 3582(c)(1)(A)(i). Even then, a stay may be warranted to allow the
26 BOP to complete its own review.

27 Even if the Court were to accept as true defendant's allegation
28 that he submitted a proper administrative request for compassionate

1 release, defendant admits that "the request" was filed on Monday,
2 March 30, 2020. If true, the statutorily mandated period of 30 days
3 for BOP to evaluate and act on any such request has not yet elapsed,
4 as required by 18 U.S.C. § 3582(c)(1)(A)(i). Accordingly, the Court
5 should dismiss the motion as premature or otherwise stay its
6 consideration until defendant has clearly filed the required request
7 and BOP has been given an opportunity to complete its administrative
8 review of the request.

9 At present, defendant simply asks the Court to assume that
10 (1) he's filed such a request, (2) the Warden at FCI Oakdale has
11 already denied it without comment, and (3) defendant is, therefore,
12 entitled to immediate release from prison. This kind of harried,
13 undocumented rush to force BOP to release a violent offender is not
14 what the law envisions, and the Court should not countenance it.

15 **2. Failure to Exhaust Cannot be Excused**

16 "[S]tatutorily-provided exhaustion requirements deprive the
17 court of jurisdiction and, thus, preclude any exercise of discretion
18 by the Court." Shaw, 946 F.3d at 533 (citation omitted). Given
19 § 3582(c)(1)(A)'s plain language and purpose, the requirements for
20 filing a sentence reduction motion--including the that defendant
21 exhaust administrative remedies or wait 30 days after filing a
22 request with the warden--are jurisdictional. Section 3582(c) states
23 that a "court may not modify" a term of imprisonment except in
24 enumerated circumstances. 18 U.S.C. § 3582(c). It thus "speak[s] to
25 the power of the court," Landgraf v. USI Film Prods., 511 U.S. 244,
26 274 (1994) (citation omitted), delineating "when, and under what
27 conditions," a court may exercise its "adjudicatory authority,"
28 Bowles v. Russell, 551 U.S. 205, 212-13 (2007) (quoting Eberhart v.

1 United States, 546 U.S. 12, 16 (2005) (per curiam)). That conclusion
2 is reinforced by courts' historical powerlessness to modify a
3 sentence once entered. See Dillon, 560 U.S. at 825; United States v.
4 Mayer, 235 U.S. 55, 67-69 (1914).

5 However, although the government maintains that
6 § 3582(c)(1)(A)'s time limit is jurisdictional, the point is
7 ultimately academic. Even if § 3682(c)(1)(A)'s exhaustion
8 requirement is not jurisdictional, it is at least a mandatory claim-
9 processing rule that must be enforced if a party "properly raise[s]"
10 it. Eberhart, 546 U.S. at 19; see generally Fort Bend County v.
11 Davis, 139 S. Ct. 1843, 1848-50 (2019). The government raises the
12 rule here, and it thus must be enforced

13 COVID-19 does not alter this conclusion. While judicially
14 created exhaustion requirements may sometimes be excused, a court may
15 not ignore a statutory command. "[M]andatory exhaustion
16 statutes . . . establish mandatory exhaustion regimes, foreclosing
17 judicial discretion." Ross v. Blake, 136 S. Ct. 1850, 1857 (2016).
18 Thus, exhaustion remains mandatory regardless of a court's view of
19 the merits: "[o]bviously, the rules requiring exhaustion of the
20 administrative remedy cannot be circumvented" simply by "asserting
21 that [an opposing party's argument is] groundless[.]" Meyers v.
22 Bethlehem Shipping Corp., 303 U.S. 41, 51-52 (1938).

23 Consistent with these rules, numerous courts have rejected
24 similar claims in the context of unexhausted COVID-19-based requests
25 for compassionate release. "Because defendant failed to exhaust his
26 administrative remedies, his request for compassionate release based
27 on COVID-19 concerns fails." United States v. Shah, No. 10-70-CJC,
28 ECF No. 329, at 3 (C.D. Cal. Mar. 30, 2020). Absent such exhaustion,

1 the court "does not have authority to grant the requested relief."
2 United States v. Sloane, No. 19-CR-10117-IT-11, ECF No. 647, at 2 (D.
3 Mass. Mar. 19, 2020) (noting no request made to the USP Lompoc
4 Warden); United States v. Gileno, No. 19-CR-161-VAB-1, 2020 WL
5 1307108, at *3-*4 (D. Conn. Mar. 19, 2020) (denying COVID-19-based
6 compassionate-release motion for lack of exhaustion); United States
7 v. Eberhart, No. 13-CR-313-PJH-1, 2020 WL 1450745, at *2 (N.D. Cal.
8 Mar25, 2020) (same); United States v. Neman, No. 14-521-JAK, ECF No.
9 863, at 4-6 (C.D. Cal. Mar. 30, 2020) (same).

10 Exhaustion is particularly inexcusable for errors that an
11 administrative tribunal is competent to address. Barron v. Ashcroft,
12 358 F.3d 674, 678 (9th Cir. 2004). Indeed, "[g]iven BOP's shared
13 desire for a safe and healthy prison environment . . . strict
14 compliance with § 3582(c)(1)(A)'s exhaustion requirement takes on
15 added--and critical--importance." Raia, 2020 WL 1647922, at *2.
16 Here, the BOP is not merely competent to address defendant's
17 compassionate-release claims; it is uniquely qualified to do so.
18 Until First Step Act, the BOP had exclusive authority to adjudicate
19 such claims. Notably, the First Step Act did not change the factors
20 relevant to compassionate release, only the procedures by which a
21 defendant can raise such claims. Ebbers, 2020 WL 91399, at *4. The
22 BOP thus has immense expertise, both in (1) assessing the safety and
23 health of their inmates and (2) managing the administration of their
24 facilities. As noted above, it likewise has other administrative
25 procedures potentially available for addressing COVID-19-based
26 concerns--none of which defendant has given them an opportunity to
27 evaluate. Exhaustion cannot--but also should not--be excused.
28 Eberhart, 2020 WL 1450745, at *2 (declining to excuse failure to

1 exhaust COVID-19 compassionate-release motion); Neman, No. 14-521-
2 JAK, ECF No. 863, at 6 (same).

3 Until 30 days have elapsed from the date defendant applies for
4 compassionate release within BOP, this Court lacks authority to grant
5 relief. 18 U.S.C. § 3582(c)(1)(1). The Court should thus dismiss
6 defendant's motion. At minimum, the Court should stay consideration
7 of the motion until the BOP has completed its administrative review.

8 **B. Defendant Has Failed to Demonstrate an "Extraordinary and**
9 **Compelling" Reason to Grant Permanent Compassionate Release**

10 Even if the Court had authority to consider the merits of
11 defendant's unexhausted request, defendant has failed to establish
12 his eligibility for compassionate release. "The First Step Act did
13 not revise the substantive criteria for compassionate release" --
14 criteria that are set forth in the Sentencing Commission's binding
15 "policy statement," USSG 1B1.13. Ebbers, 2020 WL 91399, at *4-*5; 18
16 U.S.C. § 3582(c)(1)(A). Here, defendant does not identify an
17 "extraordinary and compelling reason warrant[ing]" a reduction under
18 that definition. 18 U.S.C. § 3582(c)(1)(A). Defendant is thus
19 ineligible for compassionate release.

20 As the Third Circuit recently held, "[w]e do not mean to
21 minimize the risks that COVID-19 poses in the federal prison system,"
22 but the "mere existence of COVID-19 in society and the possibility
23 that it may spread to a particular prison cannot independently
24 justify compassionate release" -- particularly given "BOP's statutory
25 role, and its extensive and professional efforts to curtail the
26 virus's spread." Raia, 2020 WL 1647922, at *2.

1 **1. Defendant is Not Eligible for Compassionate Release**

2 As a matter of law, a defendant is eligible for compassionate
3 release only if he can demonstrate "extraordinary and compelling
4 reasons warrant[ing] such a reduction," "consistent with applicable
5 policy statements issued by the Sentencing Commission." Id. Thus,
6 as courts have recognized, Congress intended that the "Sentencing
7 Commission, not the judiciary, determine what constitutes an
8 appropriate use of the 'compassionate release' provision." United
9 States v. Willingham, No. CR113-010, 2019 WL 6733028, at *2 (S.D. Ga.
10 Dec. 10, 2019) (noting split in authority). The Sentencing
11 Commission's policy statement (see USSG § 1B.1.13) is thus binding on
12 this Court. See Dillon, 560 U.S. at 827; see, e.g., United States v.
13 Nasirun, No. 8:99-CR-367, 2020 WL 686030, at *2 (M.D. Fla. Feb. 11,
14 2020).

15 "General concerns about possible exposure to COVID-19 do not
16 meet the criteria for extraordinary and compelling reasons for a
17 reduction in sentence set forth in the Sentencing Commission's policy
18 statement[.]" Eberhart, 2020 WL 1450745, *2. Those criteria
19 include, as relevant here:

- 20 • The medical condition "of the defendant":
21 specifically, whether the defendant has either a
22 "terminal illness" or a "serious physical or medical
23 condition" that "substantially diminishes the
24 ability of the defendant to provide self-care within
25 the environment of a correctional facility and from
26 which he . . . is not expected to recover." USSG
27 § 1B1.13, comment. (n.1(A)(i)-(ii));

- 1 • The "age of the defendant": specifically, whether
- 2 defendant is "at least 65 years old," is
- 3 "experiencing a serious deterioration in physical or
- 4 mental health because of the aging process," and has
- 5 served at least 10 years or 75% of his term of
- 6 imprisonment. Id., comment. (n. 1(B)); or
- 7 • "As determined by the Director of the Bureau of
- 8 Prisons, there exists in the defendant's case an
- 9 extraordinary and compelling reason other than, or
- 10 in combination with," his illness, age, and family
- 11 circumstances. Id., comment. (n.1(D)).²

12 The global COVID-19 pandemic is not a factor unique to

13 defendant's case at all -- and, while his concerns are certainly not

14 frivolous, he offers no case-specific facts establishing his

15 eligibility for compassionate release under USSG § 1B1.13. Although

16 defendant has health concerns (an asthma condition), defendant's

17 motion relies primarily on the generalized risk of COVID-19 --

18 arguments that are common, wide-ranging, and would apply to

19 essentially every unhealthy inmate presently in custody. Although

20 FCI Oakdale lost 5 inmates to COVID-19 during the period between

21 late-March and April 3, 2020, BOP's prompt mitigation efforts appear

22 to be having the desired effect of safeguarding the inmate population

23 at FCI Oakdale, as no new COVID-related deaths have been reported

24

25

26 ² Thus, the Court may consider factors set forth in the relevant

27 BOP regulation governing compassionate release: BOP Program Statement

28 No. 5050.50, Compassionate Release/Reduction in Sentence: Procedures

for Implementation of 18 U.S.C. §§ 3582 and 4205(g) (January 17,

2019), available at

https://www.bop.gov/policy/progstat/5050_050_EN.pdf. Those factors

make no material difference here.

1 since April 3, 2020. See BOP COVID-19 Resource,
2 <https://www.bop.gov/coronavirus/index.jsp> (as of April 9, 2020).

3 Particularly considering both how the BOP has addressed COVID-19
4 generally and at FCI Oakdale, defendant's circumstances are not
5 sufficiently extraordinary and compelling to justify a modified
6 sentence. Indeed, defendant's arguments totally overlook the BOP's
7 ability to treat infectious disease. Even chronic conditions "that
8 can be managed in prison are not a sufficient basis for compassionate
9 release." United States v. Ayon-Nunez, No. 16-cR-130-DAD, 2020 WL
10 704785, at *2-3 (E.D. Cal. Feb. 12, 2020). Thus, the Court "cannot
11 assume that the Bureau of Prisons will be unable to manage [any]
12 outbreak or adequately treat [defendant] should it emerge at his
13 correctional facility while he is still incarcerated." Gileno, 2020
14 WL 1307108, at *4 (denying compassionate-release motion in COVID-19-
15 related case involving a defendant who raised specific health
16 concerns); accord Shah, No. 10-70-CJC, ECF No. 329, at 3. By
17 defendant's logic, such conditions would universally qualify
18 convicted inmates for shorter sentences given the present pandemic.
19 That is not and cannot be the case.

20 Defendant's specific health concern does not alter this
21 conclusion. Although defendant has an asthma condition, his motion
22 fails to demonstrate that the condition is serious or that it
23 currently exposes him to undue risk of infection. In defendant's
24 April 2010 Pre-Sentence Report, the USPO noted that "Tran suffered
25 from asthma during childhood and less severe asthma as an adult."
26 (PSR 85.) Thus, the severity and associated-risk of the condition
27 are unclear. Moreover, BOP's medical staff at FCI Oakdale are in a
28 far better position to assess defendant's current asthma condition

1 and evaluate whether the COVID-19 situation warrants a release,
2 transfer, or other relief. Under applicable law, the BOP must be
3 given an opportunity to make those decisions in the first instance.

4 These health concerns do not, by themselves, satisfy USSG
5 § 1B1.13. Defendant is not, for example, terminally-ill, or subject
6 to a serious and unrecoverable condition that makes him unable to
7 "provide self-care" within a BOP facility. USSG § 1B1.13, comment.
8 (n.1(A)(i)-(ii)). Defendant also does not satisfy the statute's age-
9 related conditions. Id., comment. (n.1(B)). Instead, he relies on
10 diagnoses that universally fall short of qualifying conditions.

11 Indeed, a motions panel of the Third Circuit recently denied a
12 motion for bail pending appeal based on COVID-19 concerns that were
13 argued to be amplified because of the defendant's specific health
14 problems. In United States v. Davis, No. 19-1604, ECF No. 50 (3d
15 Cir. Mar. 20, 2020), appellant James Davis sought release from
16 custody pending appeal due to a "severe risk of death from COVID-19,"
17 and specifically alleged that he was 69 years old and suffered from
18 asthma, heart arrhythmia, high blood pressure, cystitis, and a
19 history of prostate cancer with radiological treatment. See
20 Emergency Motion for Bail Pending Appeal, United States v. Davis, No.
21 19-1604, ECF No. 43-1 (3d Cir. Mar. 17, 2020). The appellant further
22 argued that while incarcerated, he lived in a shared cell with bunk-
23 style beds, in a unit housing over 100 inmates, where inmates had
24 close physical interaction. Id. Notwithstanding that more
25 compelling record, the Third Circuit denied Davis's motion for bail
26 pending appeal, without prejudice to him renewing the motion "if he
27 is diagnosed with COVID-19." Davis, ECF No. 50 (3d Cir. Mar. 20,
28 2020).

1 Thus, mere anxiety about the risk of a COVID-19 infection, even
2 when combined with defendant's health issue, simply does not present
3 an "extraordinary and compelling reason" to release defendant early
4 from his sentence. Nor has defendant provided any evidence that he
5 will be less likely to contract COVID-19 if released. Defendant's
6 circumstances are -- in the present pandemic -- far closer to
7 ordinary than "extraordinary." The motion must be denied.

8 **2. Defendant Remains a Danger to the Community, Which Also**
9 **Defeats his Eligibility for Release**

10 Defendant's motion -- even if properly exhausted, and even if
11 defendant were otherwise eligible for relief -- must also be denied
12 because he remains a danger to the community.

13 This Court may not reduce a defendant's sentence unless it finds
14 that "the defendant is not a danger to the safety of any other person
15 or to the community, as provided in 18 U.S.C. § 3142(g)." USSG
16 § 1B1.13; see United States v. Gotti, No. 02-CR-743, 2020 WL 497987,
17 at *6 (S.D.N.Y. 2020) (release was inappropriate regardless of
18 extraordinary and compelling circumstances; defendant posed a
19 continuing danger to the public); accord United States v. Urso, No.
20 03-CR-1382, 2019 WL 5423431, at *3 (E.D.N.Y. Oct. 23, 2019); United
21 States v. Applewhite, No. 08-CR-60037, 2020 WL 137452, at *2 (D. Or.
22 Jan. 13, 2020) (denying compassionate release for seriously ill 80-
23 year-old inmate based on danger).

24 The record here precludes any such finding. To the contrary,
25 defendant poses a very real danger to the community. As Judge
26 Guilford found less than two years ago, at the time he resentenced
27 defendants, defendant TRAN is convicted of a serious crime that
28 required a 15-year sentence to protect the public. That judgment is

1 unimpeachable on the facts of this case, with defendants who armed
2 themselves with five firearms (including a machinegun, silencer-
3 equipped AR-15 rifle, and silencer-equipped handgun), hundreds of
4 rounds of ammunition, zip-ties, and body armor, all in preparation
5 for committing a violent home-invasion robbery in a residential
6 community in Fountain Valley, CA.

7 In the current climate, irresponsible social habits also gravely
8 endanger the community. United States v. Hir, 517 F.3d 1081, 1088
9 (9th Cir. 2008) ("community," within the meaning of 18 U.S.C. § 3142,
10 is not necessarily confined to local geography). All California
11 residents are currently required to shelter in place and "heed the
12 current State public health directives" to avoid the spread of COVID-
13 19. California Executive Order N-33-20 (March 19, 2020), available
14 at <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>. Such
15 rules, though enforceable by peace officers, rely largely on
16 voluntary compliance. A person who ignores such rules could increase
17 infection rates, leading to citizens' severe illness and death.

18 **C. Even If Defendant Were Otherwise Eligible, 18 U.S.C. § 3553(a)**
19 **Factors Do Not Support a Shorter Sentence**

20 Finally, any compassionate-release decision -- even for a
21 statutorily eligible defendant -- must also consider the factors
22 under 18 U.S.C. § 3553(a). See 18 U.S.C. § 3582(c)(1)(A)(i).
23 Defendant addresses none of these factors in his motion. Those
24 factors -- which this Court already considered when imposing
25 defendant's 15-year sentence -- do not support his request for an
26 early, permanent release. They support his original sentence.

27 At the time of the resentencing hearing in July 2018, the Court
28 (per Judge Guilford) rejected the request of both defendants TRAN and

1 PARK for a time-served sentence of approximately 10 years. (CR 394;
2 RT 7/11/18: 37-40.) The Court did so even though defendant had "done
3 a good job in prison" and had "lot[s] of support from others," which
4 "speaks well of [defendant TRAN]." (RT 7/11/18: 37.)
5 Notwithstanding defendant's claim that he was a changed man and a
6 time-served sentence of 10 years was sufficient, the Court sentenced
7 defendant to a sentence of 15 years' imprisonment, above the
8 Guidelines range. (CR 378, 379; see also CR 394; RT 7/11/18: 37-40.)
9 In explaining its sentence, the Court said it felt a sentence of 15-
10 years' imprisonment was necessary to achieve the goals of sentencing
11 under § 3553(a), specifically, to account for the "nature and
12 circumstances of the offense," "the seriousness of the offense," "to
13 promote respect for the law and provide a just punishment," and "the
14 need to protect the public from further crimes of the defendant."
15 (RT 7/11/18: 37-40.) Judge Guilford said that one of the "things
16 that continue[d] to trouble [him] about the defendants" was "the
17 callousness of the crimes that you were convicted of," namely, the
18 callous disregard for the interests of others that defendants
19 exhibited in undercover recordings in which they planned how to
20 execute a violent, home-invasion robbery of a residence, "zip-tie"
21 the occupants, use them as human "shields" if necessary to clear the
22 house, and shoot and kill any occupant who resisted or tried to
23 escape. (Id. at 37-38.) Judge Guilford was also very troubled by
24 defendant TRAN's statement to the CI that, through use of his
25 machinegun, he could "take out five cops in a second if he had to do
26 so." (Id.)

27 Granting compassionate release would undermine the Court's
28 careful consideration of these factors at the time of sentencing.

1 Moreover, defendant's pending motion for an early, permanent release
2 implicates another important sentencing factor that was not relevant
3 at the time of the resentencing hearing: namely, the need to avoid
4 unwarranted disparity in sentencing. 18 U.S.C. § 3553(a)(6).

5 As to the issue of unwarranted disparities, it bears noting that
6 defendant TRAN's co-defendant, YU SUNG PARK, was also resentenced to
7 15-years' imprisonment (CR 380, 381) because Judge Guilford thought
8 "the circumstances are sufficiently similar for both [defendants]"
9 and thus warranted identical sentences. (See CR 394; RT 7/11/18:
10 40.) Thus, defendant TRAN's request for an early, permanent release
11 upends that result and creates significant unfairness vis-a-vis his
12 co-defendant, PARK.³ That is especially true given that the evidence
13 showed TRAN was the leader and organizer of the conspiracy.

14 V. CONCLUSION

15 Defendant's motion for compassionate release should be dismissed
16 without prejudice or, in the alternative, stayed until the BOP has
17 completed its administrative review. Even if the Court could reach
18 the merits of defendant's motion, the motion should be denied for the
19 reasons set forth above.

20 Finally, the government requests that, if this Court ultimately
21 grants relief, the government be given an opportunity to brief
22 appropriate conditions -- including a release plan, a mandatory
23 quarantine, and a period of home confinement as a condition of
24 supervised release. See 18 U.S.C. § 3582(c)(1)(A).

25
26
27
28 ³ BOP's website shows that defendant PARK is in custody at FCI Sandstone in Sandstone, Minnesota.

EXHIBIT A







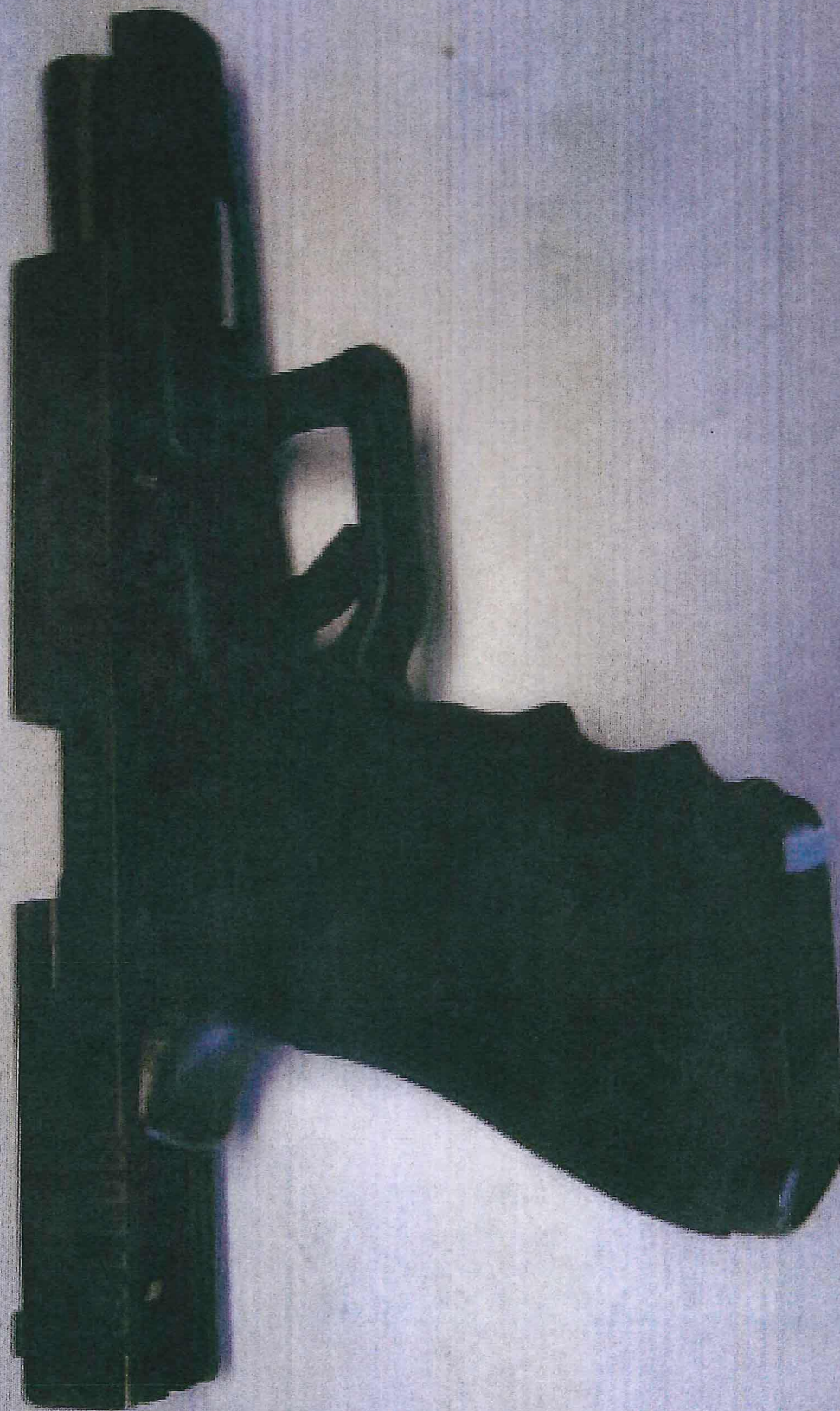
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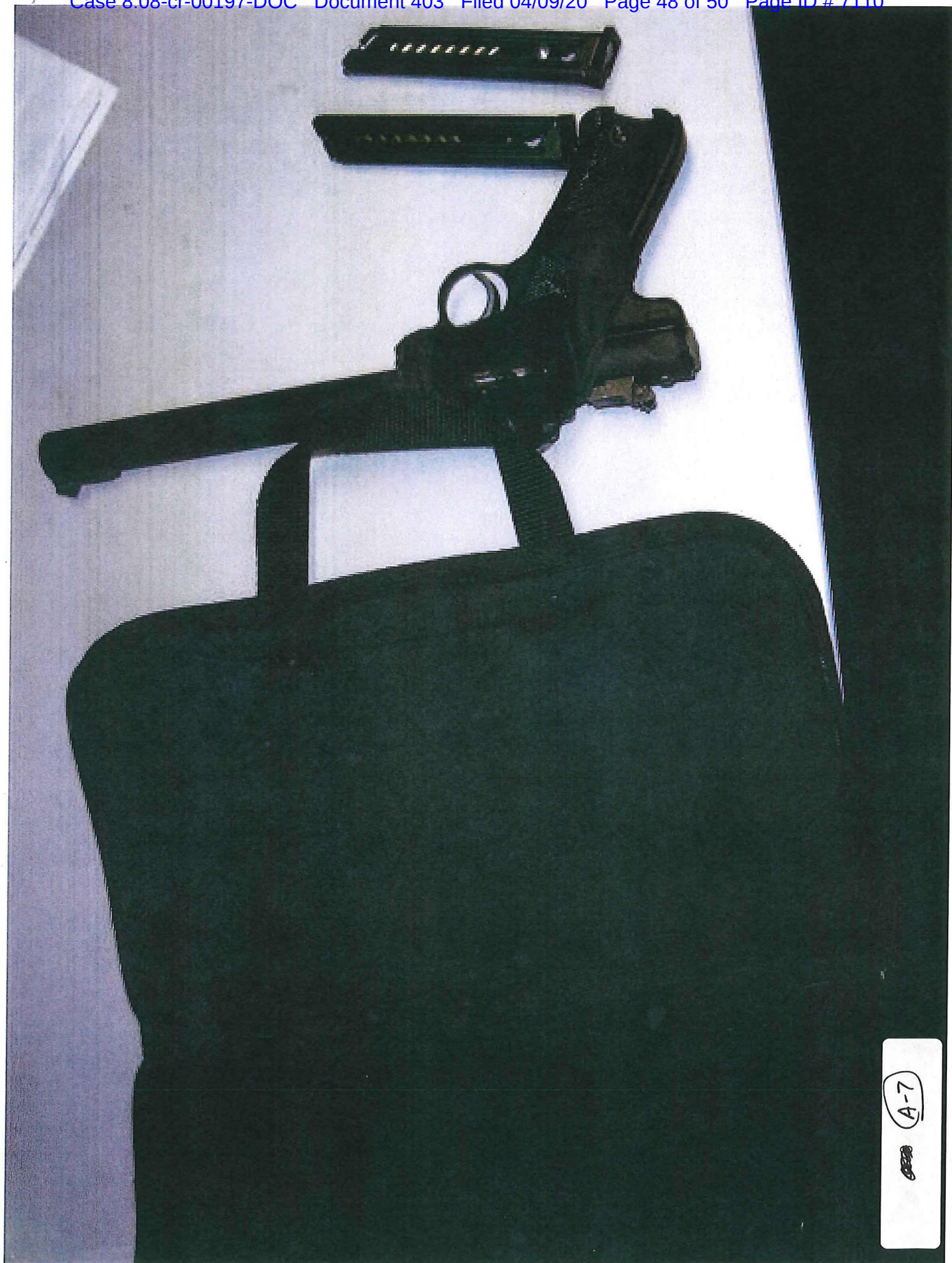
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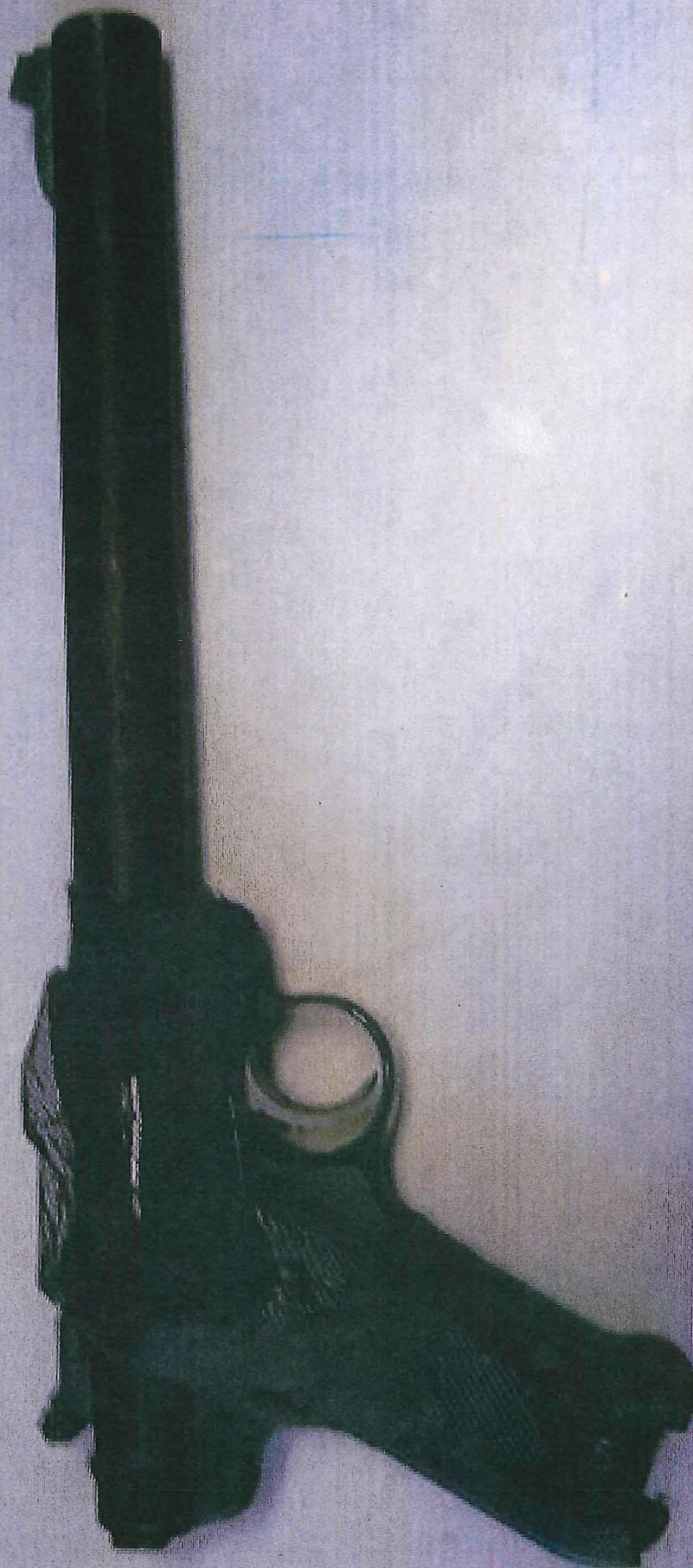


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